No. 05-18-00941-CR

In the Fifth Court of Appeals of Texas

Anthony Rashad George

Appellant

vs.

The State of Texas

Appellee

Appeal from the 282nd Judicial District Court of
Dallas County, Cause No. F16-76714-S

Appellant's Reply Brief

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Reply

As to Anthony George's first, third, fourth, and fifth appellate issues, he relies on his original briefing and oral argument to show that he is entitled to relief. But as to his second issue—as to the trial court's failure to include in the jury charge the lesser-included offense of robbery—he files this reply.

1. You've got to ignore three things to conclude that the trial court did not err in refusing to include robbery in the jury charge.

In George's opening brief, he explained that the trial court reversibly erred by refusing to include in the jury charge the lesser-included offense of robbery. Br. at 21-27; *see* RR10: 227. Robbery is included within the proof necessary to establish the offense charged; there is some evidence that would permit a rational jury to find that George is guilty of robbery but not capital murder; and the trial court's refusal inflicted "some harm." *See Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005) (a charge on a lesser-included offense should be given when (1) the lesser-included offense is included within the proof necessary to establish the offense charged; and (2) there is some evidence that would permit a rational jury to find that the defendant is guilty of the lesser

offense but not guilty of the greater); *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013) (where jury-charge complaint is preserved by an objection or request for instruction, reversal is required if defendant suffered "some harm").

The State in response agrees that robbery is included within the proof necessary to establish the offense charged. St. Br. at 27-28. And the State does not dispute that the lack of a robbery instruction was not harmless (then again, as set out in George's opening brief, "some harm" is essentially automatic). St. Br. at 27-29. But the State claims that there isn't even *some* evidence that would permit a rational jury to find that George is guilty of robbery but not capital murder. St. Br. at 28-29. On that basis, alone, the State urges this Court to overrule George's second ground.

The State's argument relies on ignoring three things. First, that anything more than a scintilla of evidence is sufficient to entitle a defendant to a jury instruction on a lesser-included offense. *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007) (citing *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)). In other words, "*any* evidence

that the defendant is guilty only of the lesser-included offense is sufficient to entitle the defendant to a jury charge on the lesser-included offense." *Id*. (emphasis added). And—critically here—this Court may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). Conspicuously, the State fails to mention all this.

Second—and even more conspicuously—the State entirely ignores Jessica Ontiveros's trial testimony that Rodney Range beat Brian Sample to death, while George was "just standing there," trying to calm her down and telling her she could not leave. RR8: 218, 221-22, 242-43, 291. Instead, the State—apparently[1] relying wholly on impeachment evidence that, at trial, Ontiveros either disavowed or did not remember—depicts the evidence as showing that "[a]fter Appellant and Range entered Brian's hotel room, they hit and kicked Brian multiple times and, after Brian lost consciousness, laid him face-down on the bed in a pool of his own blood." St. Br. at 28; *see* RR8: 236, 242, 244-45, 255-56, 258-59. But while, maybe, this Court can consider impeachment evidence in

[1] The State does not include any record citations in its argument (*see* St. Br. at 28-29), but its brief's Statement of Facts suggests that this is the basis for its depiction of the evidence. *See* St. Br. at 11-12.

its sufficiency analysis, it's absurd to suggest that Ontiveros's *trial testimony* amounts to "no evidence." Again, in considering whether there was "any evidence that [George was] guilty only of the lesser-included offense," this Court may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore*, 969 S.W.2d at 8.

Third, per the State, "there is no evidence that Brian's death was not anticipated, much less any evidence that the death should not have been anticipated." St. Br. at 29. But in fact, co-conspirator Rachel Burden testified that she anticipated only that Sample "was gonna get robbed," and that "[t]he intention was just to go up there and get money"—"[i]t was never for anybody to get hurt." RR9: 163, 165.

In arguing that there isn't even "some evidence" that would permit a rational jury to find that George is guilty only of robbery, the State thus relies on ignoring both what "some" means and what the evidence was. St. Br. at 28-29. Because, in fact, all that's needed to warrant a lesser-included offense's inclusion in the jury charge is a scintilla of evidence, and Ontiveros's (and Burden's) testimony provided at least that, George again urges this Court that there was some evidence that

would permit a rational jury to find him guilty of robbery but not capital murder. And because, as the State concedes, robbery is included within the proof necessary to establish capital murder, the trial court erred in refusing to include robbery in the charge. *See Salinas*, 163 S.W.3d at 741.

2. The State does not dispute that the trial court's error was harmful because it cannot—a finding of some harm is automatic.

Again, the State does not argue that the trial court's error was harmless. But George would like to reiterate: "When the trial court's failure to submit the requested lesser-included-offense instruction has 'left the jury with the sole option either to convict the defendant of the greater offense or to acquit him,'" "a finding of harm is automatic." *Turner v. State*, 01-08-00657-CR, 2010 WL 3062013, at *8 (Tex. App.—Houston [1st Dist.] July 30, 2010, no pet.) (quoting *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)); *see also Robalin v. State*, 224 S.W.3d 470, 477 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("When a trial court improperly refuses a requested instruction on a lesser-included offense, such that the jury is left with the sole option of either convicting the defendant or acquitting him, a finding of harm is

essentially automatic."); *Brock v. State*, 295 S.W.3d 45, 49 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (stating same); *Ray v. State*, 106 S.W.3d 299, 302–03 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (stating same).

Yes, the trial court instructed the jury on other lesser-included offenses (murder and manslaughter). CR: 152-53. But because George's trial was not about the degree of homicide of which George was guilty—it was about whether George was not guilty of any criminal homicide, guilty only of robbery—instructing the jury on murder and manslaughter did not provide for a compromise on that issue. It did not give the jury the option of convicting on a charge that did not include as an element George's causation or anticipation of Sample's death. *See Turner*, 2010 WL 3062013 at *9 ("The jury was not offered the possibility of convicting on any charge that did not include as an element Turner's reasonable anticipation of a murder committed by Brown. Thus, although the trial court instructed the jury on one lesser-included offense, on the facts of this case, felony murder was not a compromise in regard to the issue of anticipation."). "Some harm" is thus indeed automatic, and George again urges this Court to reverse his conviction and remand for

re-trial. *See id.* (holding capital-murder defendant harmed by lack of robbery instruction despite felony-murder instruction) (citing *Saunders*, 913 S.W.2d at 571); *Robalin*, 224 S.W.3d at 477.

Prayer

George again respectfully requests this Court enter a judgment of acquittal. Alternatively, George respectfully requests this Court reverse his conviction and remand this case for re-trial. And if nothing else, George respectfully requests this Court modify the judgment.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 8, 2019, this document was electronically served to Dallas County Assistant District Attorney Jaclyn O'Connor Lambert at Jaclyn.OConnor@dallascounty.org.

/s/ Robert N. Udashen
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Relying on the word count of the computer program used to prepare the document, I hereby certify that this document contains 1,379 words (excluding the parts of the document exempted by Tex. R. App. P. 9.4(i)(1)), complying with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(C).

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